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No. 04-1499
(CAPITAL CASE)

IN THE SUPREME COURT OF THE UNITED STATES

STATE OF FLORIDA,
Petitioner,

v.

ANDREW DARRYL BUSBY,
Respondent.

On Petition for Writ of Certiorari to the
Supreme Court of Florida

PETITIONER'S REPLY TO "BRIEF IN OPPOSITION FOR THE RESPONDENT"

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In his response to the Petition For Writ Of Certiorari, respondent asserts that this Court should decline to exercise its jurisdiction on the basis that the Florida Supreme Court's decision rested upon an independent and adequate state ground. "Brief In Opposition For The Respondent (hereinafter "Response"), at 2-5. Respondent fails to acknowledge or otherwise discuss, however, that the argument he presented to the state court rested upon his Sixth Amendment right to an impartial jury. Moreover, the Florida constitutional right to an impartial jury has always been interpreted *in pari materia* with the Sixth Amendment to the United States Constitution. Respondent further opposes the grant of certiorari review on the basis that state law provides a mechanism for inquiring into the propriety of a peremptory challenge. Id. at 6-7. Florida law under Busby, however, now provides a defendant with per se reversible error upon the projected use of a peremptory challenge on a discriminatory basis. The State briefly addresses each of respondent's contentions below.

I.

The Florida Supreme Court's Decision Upon The Federal Constitutional Claim Respondent Had Presented Below, That The Trial Court's Failure To Remove A Venireman Subject To A Strike For Cause And Defendant's "Loss" Of A Peremptory Challenge Used To Remove That Venireman Violated His Right To An Impartial Jury, Vests Jurisdiction In This Court.

The Florida Supreme Court's majority opinion concluded that "peremptory challenges are fundamental to each party's ability to realize the constitutional guarantee of trial by an impartial jury." App. at A-14 n.8. Respondent does not dispute that a conflict exists amongst the state high courts concerning whether the "loss" of a peremptory challenge provided under state law upon an erroneous denial of a strike for cause constitutes a denial of the constitutional right to an impartial jury requiring automatic reversal. Instead, without any acknowledgment of the federal constitutional basis for relief that respondent himself had raised before the Florida Supreme Court, respondent asserts that this Court should reject the petition because the state court's decision rests on Florida law.[1]

In his opening brief to the Florida Supreme Court, respondent raised the impartial jury issue as follows:

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[1] As demonstrated below, Busby did not argue to the state supreme court that he had been denied his statutory right to peremptory challenges or that his right to an impartial jury under the Florida Constitution accorded him greater protections than that provided under the federal constitution. Indeed, review of respondent's state appellate brief and reply brief reflects absolutely no citation to the relevant state law provisions, Fla. Stat. § 913.08 or Fla. Const. Art. I, § 16. Compare Appendix To Petition (hereinafter "App."), at A-58, A-229, respectively.

> The court erred in refusing to grant Busby's cause challenges to prospective juror Kim Lapan, a former guard of death row prisoners and one who had a bias against them, which forced him to use a peremptory challenge to keep him off his jury, *a violation of his Fifth, Sixth, and Fourteenth Amendment rights*.

App. at A-73 (emphasis added). Busby relied upon his federal constitutional right to an impartial jury, and cited state appellate decisions interpreting that right. Id. at A-78-80. The State certainly understood respondent's claim as arising under the Sixth Amendment and addressed it as such. Id. at A-170-171. Busby made no attempt to correct the State's now supposed mistaken understanding. Instead, that Busby repeated the federal basis of his argument in his reply brief to the Florida Supreme Court renders the position now taken before this Court disingenuous:

> The issue presented here is quite simple: Did the court correctly deny Busby's cause challenge for prospective juror Lapan. If not, and if he preserved the issue, as required by Trotter v. State, 576 So. 2d 691 (Fla. 1990), reversal is automatic because he did not have the *impartial jury guaranteed by the Sixth Amendment*. Id. at 693; Gootee v. Clevinger, 778 So. 2d 1005 (Fla. 5th DCA 2000).

App. at A-231 (emphasis added); see also id. at A-232 ("Thus, if, because the court wrongly forced Busby to exercise a peremptory challenge on Lapan, the defendant exhausted his peremptory challenges before he could challenge either Winston or Liebel peremptorily, and one or both of them sat as one of his jurors, then a biased juror sat, and Busby was denied the impartial jury the *Sixth Amendment* guarantees.") (emphasis added).

Respondent further neglects to address the fact that the right to an impartial jury guaranteed by the Florida Constitution, Art. I, § 16, and the Sixth Amendment to the United States Constitution, are one in the same. As the Florida Supreme Court stated in State v. Neil, 457 So. 2d 481 (Fla. 1984), "Article I, section 16 of the Florida Constitution guarantees the right to an impartial jury. The right to peremptory challenges is not of constitutional dimension. The primary purpose of peremptory challenges is to aid and assist in the selection of an impartial jury." Id. at 486. This Court's interpretation in Ross v. Oklahoma, 487 U.S. 81 (1988) of the right under the Sixth Amendment is indistinguishable: "[W]e reject the notion that the loss of a peremptory challenge constitutes a violation of the constitutional right to an impartial jury. We have long recognized that peremptory challenges are not of constitutional dimension. . . . They are a means to achieve the end of an impartial jury." Id. at 88 (internal citations omitted). And at no time when considering the scope of the right to an impartial jury has the Florida Supreme Court differentiated between the state and federal provisions. Compare Marshall v. State, 854 So. 2d 1235, 1241 n.7 (Fla. 2003); Foster v. State, 778 So. 2d 906, 912 (Fla. 2000); Rolling v. State, 695 So. 2d 278, 284 (Fla. 1997); Powell v. Allstate Ins. Co., 652 So. 2d 354, 358 (Fla. 1995); State v. Alen, 616 So. 2d 452, 453 (Fla. 1993); Brown v. State, 538 So. 2d 833, 834-835 (Fla. 1989); Manning v. State, 378 So. 2d 274, 277 (Fla. 1979).

What respondent does address is the import of the state court's "mention[]" of Ross and United States v. Martinez-Salazar, 528 U.S. 304 (1990). Response, at 4-5. According to Busby, neither opinion is significant. The significance respondent fails to grasp, however, is that the Florida Supreme Court distinguished those decisions upon its conclusion that this Court has not previously decided the constitutional issue as presented in Busby, where a defendant did all that state law required to preserve the impartial jury claim and was denied a request for an additional peremptory challenge to remove an identified venireman. See App. A-21 & n.13 (quoting Martinez-Salazar, 528 U.S. at 317-18

(Souter, J., concurring)). Thus as the Florida Supreme Court opinion makes clear, this case presents an issue left open in Ross and Martinez-Salazar: whether the constitutional right to an impartial jury is violated where a defendant "loses" his state right to a peremptory challenge to remove a biased juror as required by state law to preserve the claim of an erroneous denial of a motion to strike for cause. Moreover, because the majority concluded that "peremptory challenges are fundamental to each party's ability to realize the constitutional guarantee of trial by an impartial jury," App. at A-14 n.8, the decision is interwoven with federal law.

Accordingly, under this Court's independent and adequate state law jurisprudence, see, e.g., Michigan v. Long, 463 U.S. 1032, 1040-1041 (1983), jurisdiction is properly vested in this Court under 28 U.S.C. § 1257(a). See also Ohio v. Reiner, 532 U.S. 17, 20 (2001) ("[T]his Court retains a role when a state court's interpretation of state law has been influenced by an accompanying interpretation of federal law.") (internal citation and quotation marks omitted).

II.

The Florida Supreme Court's Holding That A Defendant Has An Unqualified Right To Peremptory Challenges To Effectuate His Constitutional Right To An Impartial Jury Permits The Unconstitutional Discriminatory Use Of Peremptory Challenges.

Respondent believes it is sufficient that "Florida law provides a mechanism for any party to challenge the other's use of peremptory challenges," Response, at 6, notwithstanding that the Busby majority erected a rule of per se reversible error. To obtain automatic reversal, the defendant need only show that the trial court erroneously failed to remove a venireman for cause, having preserved the error by using a peremptory challenge to strike that

individual, used all remaining peremptories, and requested but was denied an additional peremptory challenge to remove an identified juror. Thus even if the State avails itself of the procedure respondent identifies, Petitioner is without recourse upon demonstrating that a defendant's proposed peremptory challenge was racially or otherwise improperly motivated. If the defendant is acquitted, double jeopardy obviously precludes a retrial. In the event that the State does obtain a conviction, the defendant's unconstitutional projected use of a peremptory challenge provides the basis for per se reversible error. The Florida Supreme Court did not create any exception to its rule requiring automatic reversal. Thus the fact that the State could arguably make its record, as respondent contends, is irrelevant. Simply put, the State's remedy is nothing short of illusory.

Accordingly, whether sounding in state or federal law, Busby stands for the proposition that a defendant may, in violation of Batson v. Kentucky, 476 U.S. 79 (1986) and its progeny, and the Fourteenth Amendment, build in reversible error to obtain a new trial in the event of a conviction.

CONCLUSION

Respondent urges this Court to not take up the very issue he presented to the Florida Supreme Court -- i.e., whether the federal constitutional right to an impartial jury is violated when, to preserve the claim under state law, a defendant must use a peremptory challenge to remove a venireman whom the trial court erroneously failed to remove for cause. Because that issue was before the state court and decided, and the Florida constitutional right has always been interpreted *in pari materia* with the Sixth Amendment right to an impartial jury, jurisdiction is properly vested in this Court. Under the majority's opinion, peremptory challenges are now of constitutional dimension and may be exercised on an unconstitutionally discriminatory basis. For the reasons discussed above and in the Petition, the State of Florida prays the Court for its order granting the petition.

Respectfully submitted,

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